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No. 96-568

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH ONCALE, PETITIONER

v.

SUNDOWNER OFFSHORE SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, protects employees from sexual harassment by supervisors and coworkers of the same gender.

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. From August to November 1991, petitioner Joseph Oncale was employed by Sundowner Offshore Services, Inc., on an offshore oil rig. He filed this Title VII action against Sundowner; John Lyons, his Sundowner supervisor; and Danny Pippin and Brandon Johnson, two Sundowner coworkers, alleging

sexual harassment by Lyons, Pippin, and Johnson.[1] His complaint alleges three specific incidents of physical harassment. First, Pippin held petitioner down while Lyons put his exposed penis on the back of petitioner's head. Second, Johnson held petitioner down while Lyons placed his exposed penis on petitioner's arm. In the final episode, Pippin and Lyons grabbed petitioner in the shower and Lyons forced a bar of soap between petitioner's buttocks. In addition, the complaint alleges that Lyons and Pippin repeatedly made vulgar and demeaning remarks, both during these three incidents and on other occasions. Compl. ¶¶ 8A-8D.

In deposition testimony, petitioner stated that Lyons, Pippin, and Johnson all grabbed petitioner's buttocks at different times and that Lyons verbally harassed him, saying, "[y]ou know you got a cute little ass," Oncale Dep. 40, and stating his intention to have sex with him: "I'm going to get you. You're going to give it to me," *id.* at 42. Petitioner also testified that, during the shower incident, Lyons threatened him with anal intercourse. *Id.* at 58. In an affidavit filed with the Equal Employment Opportunity Commission (EEOC), petitioner states that Lyons threatened him with anal intercourse during the first incident as well. Oncale Aff. 2.

Petitioner states (Pet. 6) that he informed the employer's highest ranking on-site representative about the harassment, but that nothing was done to halt or punish it. Oncale quit shortly after the shower incident. *Ibid.* He alleges both *quid pro quo* and hostile work environment sexual harassment.

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[1] We refer to respondents collectively as "Sundowner" or "respondent."

2. The district court granted summary judgment to Sundowner. Pet. App. 10-15. It relied on *Garcia* v. *Elf Atochem North America*, 28 F.3d 446 (1994), in which the Fifth Circuit "clearly articulated its position that same sex harassment does not state a claim under Title VII." Pet App. 12. The district court also concluded that Pippin and Johnson could not be considered employers under Title VII. *Id.* at 14.

3. The court of appeals affirmed, Pet. App. 1-7, likewise reading *Garcia* as binding precedent "bar[ring] all same-sex sexual harassment claims," *id.* at 5.

DISCUSSION

In our view, the court of appeals erred in holding that Title VII "bar[s] all same-sex sexual harassment claims." Pet. App. 5. The plain language of the statute, prior decisions of this Court, and longstanding guidelines of the EEOC all support the conclusion that Title VII protects all employees from sex discrimination, without regard to the gender of the harasser or the victim. As there is a conflict among the courts of appeals on this question, further review by this Court is appropriate.

1. a. Under the Fifth Circuit's approach, Title VII offers no recourse to an employee who complains of gender-based harassment by a supervisor or coworker of the same gender. That categorical rule is contrary to the plain language of Title VII, which states simply that it is "an unlawful employment practice for an employer * * * to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national

origin." 42 U.S.C. 2000e-2(a)(1). This Court has held that an employer discriminates because of sex with respect to conditions of employment when it permits or "requir[es] people to work in a discriminatorily hostile or abusive environment." *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). Such a hostile environment may be caused not only by overtly sexual behavior, but also by "discriminatory intimidation, ridicule and insult," *ibid.* (quoting *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 65 (1986)), that are "sufficiently severe or pervasive to alter the conditions of the victim's employment" 510 U.S. at 21 (quoting *Meritor Savings Bank*, 477 U.S. at 67). An employer discriminates through *quid quo pro* sexual harassment when it uses "submission to or rejection of" "[u]nwelcome sexual advances, requests for sexual favors, [or] other verbal or physical conduct of a sexual nature" as the basis for employment decisions. 29 C.F.R. 1604.11(a).

On its face, Title VII's gender-neutral prohibition of sex discrimination extends to both opposite-sex and same-sex discrimination, as long as the challenged conduct occurred "because of" the victim's sex. Compare, for example, a female supervisor who denied female employees promotions because of her personal preference to work with men, and a male supervisor who denied female employees promotions for the same reason. Simple logic and the language of the statute dictate that, in each case, the inquiry should be identical: whether the employee's gender was a basis for the supervisor's employment decision. 42 U.S.C. 2000e-2(a), 2000e-2(m). It should be irrelevant whether the supervisor and employee are of the same or opposite sex.

If Congress had meant to limit the reach of Title VII to discrimination against the opposite sex, it easily could have said so. Cf. *United States* v. *Turkette*, 452 U.S. 576, 581 (1981) (if Congress had intended RICO solely to protect against infiltration of "legitimate" enterprises, it could have inserted "legitimate" in the definition of "enterprise"). Instead, Congress drafted a provision that broadly prohibits discrimination because of sex, without regard to the gender of the victim or the discriminator.

Where, as here, "the statutory language is clear," the court's "sole function . . . is to enforce it according to its terms." *Rake* v. *Wade*, 508 U.S. 464, 471 (1993). The Court has followed this approach with respect to Title VII's prohibition on discrimination. Thus, in *Johnson* v. *Transportation Agency*, 480 U.S. 616 (1987), the Court recognized that Title VII's prohibition on discrimination "because of sex" prohibits discrimination against men as well as women. Similarly, in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Court concluded that, because the terms of the statute prohibit discrimination "against any individual" because of the individual's race, it prohibits discrimination against members of any racial group, minority or majority. *Id.* at 279 (citing *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971)).

b. Nothing in the legislative history contradicts or casts doubt on the plain reading of this gender-neutral provision. See generally *Ardestani* v. *INS*, 502 U.S. 129, 135-136 (1991) (presumption that statutory language expresses congressional intent cannot be rebutted except in "rare and exceptional circumstances"). As this Court recognized in *Meritor Savings Bank*, 477 U.S. at 63-64, the prohibition

against sex discrimination was added to Title VII "at the last minute on the floor of the House of Representatives," and "we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'"

Moreover, even accepting respondent's contention that Congress's primary focus in enacting Title VII's gender provision was discrimination against women, it does not follow, as respondent claims (Br. in Opp. 5, 9), that Title VII has only that "limited purpose."[2] This Court has "never required that every permissible application of a statute be expressly referred to in its legislative history"; rather, it applies the broad language of the statute to the specific conduct that falls within that language. *Moskal* v. *United States*, 498 U.S. 103, 111 (1990); *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history."). The specific conduct of same-gender sexual harassment clearly falls within Title VII's broad, gender-neutral prohibition of discrimination on the basis of sex.

c. The Fifth Circuit's blanket rule barring same-gender sexual harassment claims under Title VII

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[2] Cf. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 679 (1983) (although "congressional discussion [of the Pregnancy Discrimination Act] focused on the needs of female members of the work force rather than spouses of male employees," this creates no "'negative inference' limiting the scope of the act to the specific problem that motivated its enactment") (quoting *Turkette*, 452 U.S. at 591); *McDonald*, 427 U.S. at 289 (while the "immediate impetus for [42 U.S.C. 1981] was the necessity for further relief of the constitutionally emancipated former Negro slaves," it also reaches claims of race discrimination against whites).

finds no support in this Court's sexual harassment decisions, which articulate Title VII's mandate in broad, gender-neutral terms. In *Meritor Savings Bank*, 477 U.S. at 64, the Court stated that, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." Simply stated, "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Id.* at 66; see also *Harris*, 510 U.S. at 21. In explaining the rationale for recognizing sexual harassment as a form of actionable discrimination, the Court again spoke in inclusive, gender-neutral terms: "Surely, a requirement that a *man or woman* run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." *Meritor Savings Bank*, 477 U.S. at 67 (quoting *Henson* v. *City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)) (emphasis added).

Indeed, in *Harris* the Court reiterated that Title VII "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of *men and women*' in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." 510 U.S. at 21 (quoting *Meritor Savings Bank*, 477 U.S. at 64 (quoting *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 707 n.13 (1978))) (emphasis added) (some internal quotation marks omitted). By logical extension, if Title VII's language does not require that the victim be of a particular gender, or that the harasser be of a particular gender, it should not be read to require

that the victim be of a particular gender in relation to the harasser.

d. The Fifth Circuit's categorical ban on same-gender sexual harassment claims is contrary to the EEOC's consistent interpretation of Title VII. EEOC guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank*, 477 U.S. at 65 (quoting *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141-142 (1976)); see *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988) (EEOC's interpretation of Title VII "need only be reasonable to be entitled to deference"). Since the EEOC's first pronouncement on this subject in 1981, it has consistently read the statute to prohibit same-gender sexual harassment.[3] Because the EEOC's guidelines

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[3] Since 1981, the EEOC Compliance Manual has stated:

> The victim does not have to be of the opposite sex from the harasser. * * * [T]he crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat employees of the opposite sex the same way.

II EEOC Comp. Man., § 615.2(b)(3) (Oct. 1981). In its first decision addressing same-gender sexual harassment, the EEOC reaffirmed that "a discriminatory practice is unlawful when it occurs because an individual is a male or a female." EEOC Dec. No. 81-16 (Jan. 1981), *reprinted in* EEOC Dec. (CCH) at 4796 (1983 ed.). Thus, if a male employee was laid off because he rejected the unwanted sexual advances of his male supervisor, the employer would be liable for a Title VII violation. *Id.* at 4797 & n.7 (citing 29 C.F.R. 1604.11(c)).

on same-gender sexual harassment are fully consistent with the language of the statute and have not changed over time, they are entitled to weight. Cf. *Gilbert*, 429 U.S. at 141-142 (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)).

e. The Fifth Circuit's two published decisions on same-gender sexual harassment fail to consider the text or history of the statute, this Court's Title VII precedents, or the EEOC's consistent interpretation of the statute. The Fifth Circuit's decisions advance no principles of statutory construction that would justify reading Title VII's prohibition on sex discrimination to exclude same-gender sexual harassment. The decision below does not analyze the relevant statutory language at all. It simply reads the Fifth Circuit's prior decision in *Garcia*, 28 F.3d at 451, to "bar[] all same-sex sexual harassment claims." Pet. App. 5. *Garcia* itself provides virtually no analysis. Its discussion of same-gender sexual harassment reads, in its entirety:

> Finally, we held in *Giddens* v. *Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993) (unpublished), that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." *Accord Goluszek* v. *Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). Thus, what [the putative supervisor] did to [the employee] could not in any event constitute sexual harassment within the purview of Title VII, and hence summary judgment in favor of all defendants was proper on this basis also.

28 F.3d at 451-452.

Respondent likewise provides no rationale for limiting the natural scope of Title VII's language to exclude same-gender sexual harassment. While conceding that Title VII prohibits "discriminat[ion] against women because they are women and against men because they are men," Br. in Opp. 6 (quoting *Ulane* v. *Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985)), and that "same-gender discrimination can be a form of 'sexual harassment,'" respondent simply asserts, without support, that same-gender sex discrimination "is beyond the reach of Title VII." Br. in Opp. 7.

2. There is a conflict among the courts of appeals on whether and when same-gender sexual harassment can create a hostile work environment in violation of Title VII. The Fifth Circuit's categorical ban on all such claims conflicts with decisions of the Fourth, Sixth, and Eighth Circuits. See *Yeary* v. *Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443 (6th Cir. 1997); *Wrightson* v. *Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir. 1996); *Quick* v. *Donaldson Co.*, 90 F.3d 1372, 1378-1379 (8th Cir. 1996); *Hopkins* v. *Baltimore Gas & Elec. Co.*, 77 F.3d 745, 753 (4th Cir.), cert. denied, 117 S. Ct. 70 (1996); *McWilliams* v. *Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir.), cert. denied, 117 S. Ct. 72 (1996).

The Fourth Circuit has held that same-gender hostile work environment claims are actionable under Title VII "where a homosexual * * * employer discriminates against an employee of the same sex or permits such discrimination against an employee by homosexual employees of the same sex." *Wrightson*, 99 F.3d at 143. A divided panel of the Fourth Circuit has held, however, that "such a claim does not lie where both the alleged harassers and the victim are

heterosexuals of the same sex." *McWilliams*, 72 F.3d at 1195. The Sixth Circuit has held that same-gender sexual harassment can create a hostile work environment in violation of Title VII, at least where the harasser is a homosexual who selects his victim based on sexual attraction. *Yeary*, 107 F.3d at 448. The Sixth Circuit expressly declined to decide whether same-gender sexual harassment is actionable where the harasser is not a homosexual. *Ibid.* Finally, the Eighth Circuit has held that a male plaintiff can maintain a Title VII claim based on gender-based physical and verbal harassment by male coworkers, without requiring that the plaintiff allege or prove that the coworkers were homosexuals. *Quick*, 90 F.3d at 1378-1379.[4]

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[4] Other circuits have stated in dicta that same-gender sexual harassment is actionable under Title VII. See *Baskerville* v. *Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) ("[s]exual harassment of women by men is the most common kind," but "we do not mean to exclude the possibility that sexual harassment of * * * men by other men, or women by other women would not also be actionable in appropriate cases"); *Steiner* v. *Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) ("we do not rule out the possibility that *both* men and women * * * have viable claims against [the male supervisor] for sexual harassment"), cert. denied, 513 U.S. 1082 (1995); *Saulpaugh* v. *Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir. 1993) (Van Graafeiland, J., concurring) ("harassment is harassment regardless of whether it is caused by a member of the same or opposite sex"), cert. denied, 510 U.S. 1164 (1994); *Bundy* v. *Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (rejecting argument that harassment of employee by homosexual supervisor of same gender is not sex discrimination and noting that "in each instance the question is * * * would the complaining employee have suffered the harassment had he or she been of a different gender?"); *Barnes* v. *Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (noting possibility of actionable

We agree with the Eighth Circuit that an employee can state a Title VII claim based on harassment by a supervisor or coworker of the same gender without alleging that the harasser is a homosexual or that the harassment was based on sexual attraction. Under Title VII, "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Meritor Savings Bank*, 477 U.S. at 66. The severe or pervasive "discriminatory intimidation, ridicule, and insult" that violate Title VII, *Harris*, 510 U.S. at 21 (quoting *Meritor Savings Bank*, 477 U.S. at 65), may well result not from sexual attraction, but from the harasser's aggression, abuse of power, prejudice, or other underlying motivation. Thus, if male supervisors are abusive toward male employees, but polite toward female employees, this can constitute discrimination "because of sex," without regard to whether the abuse reflects disdain, desire, or some other underlying motivation. See *Quick*, 90 F.3d at 1378-1379 (male plaintiff stated hostile work environment claim based on allegations that male employees physically abused male coworkers, but not female coworkers).

As yet, there is no circuit conflict on whether same-gender *quid pro quo* claims are cognizable under Title VII. All three Fourth Circuit cases involved only hostile work environment claims, *Wrightson*, 99 F.3d at 138; *Hopkins*, 77 F.2d at 754; *McWilliams*, 72 F.3d at 1195. In *McWilliams*, 72 F.3d at 1195 n.4, that court expressly reserved the question whether other Title VII same-sex discrimination

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sexual harassment where "a subordinate of either gender" is harassed "by a homosexual superior of the same gender").

claims are actionable. Similarly, the Eighth Circuit faced only a hostile work environment claim in *Quick*, 90 F.3d at 1377, and there was no mention of any *quid pro quo* harassment in *Yeary*, 107 F.3d at 443. Finally, it is not clear whether the court below considered petitioner's *quid pro quo* claim; its decision spoke only in general terms of sexual harassment, see Pet. App. 1-4, and relied exclusively on *Garcia*, 28 F.3d at 451-452, which was strictly a hostile work environment case. Although the courts of appeals thus have not addressed the question, there is no basis for distinguishing hostile work environment from *quid pro quo* harassment for purposes of deciding whether same-gender harassment because of sex is prohibited by Title VII. There is a circuit conflict on that basic issue.

3. This case presents an appropriate vehicle to consider the legal question whether same-gender sexual harassment ever is actionable under Title VII. It may not, however, provide an opportunity for this Court to resolve certain additional questions that may accompany a claim of same-gender sexual harassment. First, because the lower courts disposed of petitioner's claim on the purely legal basis that it was barred by Fifth Circuit precedent, this case comes to the Court without any development or analysis of the facts.[5] Neither court discussed the

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[5] The district court did conclude, based on an affidavit submitted by Sundowner's personnel director, that Pippin and Johnson could not be considered petitioner's "employers" for purposes of Title VII liability. Pet. App. 14-15 & n.4. The court's consideration of the record evidence was limited, however, to determining Pippin's and Johnson's status.

Moreover, the district court's conclusions about Pippin's and Johnson's status as coworkers, which petitioner does not chal-

nature of the harassment petitioner suffered or addressed his contention that it was based on his gender. Neither court considered petitioner's contention that his supervisor's and coworkers' threat of anal intercourse went beyond mere "horseplay" to constitute "severe and pervasive" harassment because of sex. See Plaintiff's Opp. to Mot. for Summ. Judg. 9-12. By the same token, neither court considered respondent Sundowner's contention that the alleged harassment could not be "because of sex" where there was no evidence that petitioner's supervisor or coworkers harassed him because of his gender or treated men and women differently on the basis of gender. Resp. C.A. Br. 15. Accordingly, in its present posture, this case has "a rather abstract quality" that might not be conducive to the announcement of "definitive rule[s]" governing when and under what circumstances same-gender sexual harassment violates Title VII. *Meritor Savings Bank*, 477 U.S. at 72.

In addition, this case arises in the unusual factual context of an all-male work environment. Unlike many gender discrimination plaintiffs, petitioner cannot support his contention that he was discriminated against because of his sex by demonstrating that coworkers of the opposite sex were not exposed to the same disadvantageous terms and conditions of employment. Cf. *Kopp* v. *Samaritan Health Sys., Inc.*, 13 F.3d 264, 268 (8th Cir. 1993) (female plaintiff demonlenge, is not dispositive of Sundowner's liability. Sundowner may be liable for harassment by petitioner's coworkers if its agents had notice of the harassment and failed to take steps to stop it, see 28 C.F.R. 1604.11(d), or for the actions of Lyons, who all concede was petitioner's supervisor, see *Meritor Savings Bank*, 477 U.S. at 72.

strated that supervisor's abuse was gender-based by showing that his "treatment of female employees [wa]s worse then his treatment of male employees").[6] We do not suggest, however, that a comparison between male and female employees is indispensable. Nothing in the text of Title VII denies its protections to employees in a single-gender workplace.

[6] As in cases involving opposite-sex harassment, an inquiry into the relative treatment of members of each sex is often useful in cases of same-gender sexual harassment. See *Yeary*, 107 F.3d at 448 (male Title VII plaintiff harassed by male supervisor suffered an "institutional disadvantage" in that "[h]e had to put up with abuse and harassment that women there did not have to endure"); *Quick*, 90 F.3d at 1378-1379; *Wrightson*, 99 F.3d at 142 (concluding that male Title VII plaintiff stated claim for sexual harassment where he alleged that his male supervisor and coworkers sexually harassed certain male employees, but no female employees); *Waag* v. *Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393, 403 (D. Minn. 1996) (male plaintiff demonstrated discriminatory gender-based harassment by demonstrating that male supervisor's sexual advances were directed only at male employees); *EEOC* v. *Walden Book Co.*, 885 F. Supp. 1100, 1104 (M.D. Tenn. 1995) (where male supervisor makes offensive sexual advances to a "subordinate of the same sex, and not * * * to employees of the opposite sex, it absolutely is a situation where, but for the subordinate's sex, he would not be subjected to that treatment"); *Sardinia* v. *Dellwood Foods, Inc.*, No. 94 Civ. 5458 (LAP), 1995 WL 640502, at *4-*5 (S.D.N.Y. Nov. 1, 1995) (denying employer's motion to dismiss Title VII claim where male plaintiff alleged that two male supervisors physically and verbally harassed male employees, but not female employees); *McCoy* v. *Johnson Controls World Servs., Inc.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995) (denying employer's motion to dismiss where female plaintiff alleged sexual harassment by female coworkers and there was no suggestion that harassers also harassed male employees).

The aforementioned factors may make it difficult for the Court to give comprehensive consideration to how a Title VII plaintiff can state and prove a claim for same-gender sexual harassment. Nonetheless, we believe the Court should grant certiorari in this case to resolve the purely legal question of whether same-gender sexual harassment ever is actionable under Title VII. If, as we urge, the Court concludes that it is, the Court may then remand the case for consideration of the merits of petitioner's contention that he was discriminated against because of his sex. That disposition would afford an opportunity for the courts of appeals to address in the first instance the various evidentiary and other issues that may arise in connection with same-gender harassment claims.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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